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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 721

CAPITOL WINE AND SPIRIT CORPORATION, PETITIONER

v.

STEWART BERKSHIRE, AS DEPUTY COMMISSIONER OF THE BUREAU OF INTERNAL REVENUE, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 346–350) is reported in 150 F. 2d 619.

JURISDICTION

The order sought to be reviewed was entered October 8, 1945 (R. 359). The petition for a writ of certiorari was filed January 7, 1946. The jurisdiction of this Court is invoked under Section 4 (h) of the Federal Alcohol Administration Act, 49 Stat. 977, 27 U. S. C. 204 (h), and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioner was deprived of a fair hearing.

2. Whether there is presented the question of petitioner's right to a wholesaler's basic permit under Section 4 (a) (1) of the Federal Alcohol Administration Act.

STATUTE INVOLVED

Section 4 of the Federal Alcohol Administration Act, 49 Stat. 977 (27 U. S. C. 204), provides in part as follows:

> (a) The following persons shall, on application therefor, be entitled to a basic permit:
>
> (1) Any person who, on May 25, 1935, held a basic permit as distiller, rectifier, wine producer, or importer issued by an agency of the Federal Government.
>
> (2) Any other person unless the Administrator finds (A) that such person (or in case of a corporation, any of its officers, directors, or principal stockholders) has, within five years prior to date of application, been convicted of a felony under Federal or State law or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor, including the taxation thereof; or (B) that such person is, by reason of his business experience, financial standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in

conformity with Federal law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted.

(b) If upon examination of any application for a basic permit the Administrator has reason to believe that the applicant is not entitled to such permit, he shall notify the applicant thereof and, upon request by the applicant, afford him due notice and opportunity for hearing on the application. If the Administrator, after affording such notice and opportunity for hearing, finds that the applicant is not entitled to a basic permit hereunder, he shall by order deny the application stating the findings which are the basis for his order.

(c) The Administrator shall prescribe the manner and form of all applications for basic permits (including the facts to be set forth therein) and the form of all basic permits, and shall specify in any basic permit the authority conferred by the permit and the conditions thereof in accordance with the provisions of this Act. To the extent deemed necessary by the Administrator for the efficient administration of this Act, separate applications and permits shall be required by the Administrator with respect to distilled spirits, wine, and malt beverages, and the various classes thereof, and with respect to the various classes of persons entitled to permits hereunder. The issuance of a basic permit under this Act shall not operate to deprive the United

States of its remedy for any violation of law.

* * * * *

(e) A basic permit shall by order of the Administrator, after due notice and opportunity for hearing to the permittee, (1) be revoked, or suspended for such period as the Administrator deems appropriate, if the Administrator finds that the permittee has willfully violated any of the conditions thereof, provided that for a first violation of the conditions thereof the permit shall be subject to suspension only; or (2) be revoked if the Administrator finds that the permittee has not engaged in the operations authorized by the permit for a period of more than two years; or (3) be annulled if the Administrator finds that the permit was procured through fraud, or misrepresentation, or concealment of material fact. The order shall state the findings which are the basis for the order.

Reorganization Plan No. III (54 Stat. 1231); prepared pursuant to the Reorganization Act of 1939 (53 Stat. 561), which became effective June 30, 1940, by Joint Resolution of June 4, 1940 (54 Stat. 230, 231), provided that the functions of the Administrator under the Federal Alcohol Administration Act "shall be administered under the direction and supervision of the Secretary of the Treasury through the Bureau of Internal Revenue in the Department of the Treasury." The Secretary of the Treasury delegated the functions of the Administrator "to the Deputy

Commissioner of the Bureau of Internal Revenue in charge of the Alcohol Tax Unit, to be exercised by him under the direction and supervision of the Commissioner of Internal Revenue and the Secretary of the Treasury" (Treasury Department Order No. 30, 5 Fed. Reg. 2212). Subsequently these same powers were also delegated to the District Supervisors of the Alcohol Tax Unit, to be exercised by them subject to the supervision and direction of the Deputy Commissioner (Treasury Decision 4982, 5 Reg. 2549).

STATEMENT

The Federal Alcohol Administration Act was enacted August 29, 1935. Section 4 (a) (1) of the Act provides that any person who, on May 25, 1935, held a basic permit as a distiller, rectifier, wine producer or importer issued by an agency of the Federal Government, is entitled to a basic permit. In October 1935 this provision was administratively construed by a duly promulgated regulation to entitle such an applicant to a basic permit of the same type as that which the applicant held on May 25, 1935 (27 C. F. R. 4, 2). Under this construction no one, including a person who had held other types of basic permits on May 25, 1935, could obtain a wholesaler's [1] basic

[1] Prior to the passage of the Federal Alcohol Administration Act wholesalers were not required to obtain basic permits from the Federal Alcohol Control Administration (established under the National Industrial Recovery Act), although such basic permits were required of distillers, rectifiers, wine producers and importers.

permit under Section 4 (a) (2) if he (or in case of a corporation, any of its officers, directors, or principal stockholders) had, within five years been convicted of a felony under Federal or State law; or had, within three years, been convicted of a misdemeanor under any Federal law relating to liquor; or if such person was, by reason of his business experience, financial standing or trade connections, not likely to maintain such operations in conformity with Federal law.

In January 1936 petitioner, which had held an importer's permit on May 25, 1935, applied for a wholesaler's basic permit (R. 175) in the manner and form prescribed by the Administrator under the authority of Section 4 (c) of the Act (R. 176–195). The applicable instructions required information, in affidavit form, from which the Administrator could determine the eligibility of the applicant, including information as to the identity of the persons who owned and managed the applicant; their prior connections, if any, with the liquor industry; and whether the applicant or any of its directors, officers or stockholders owning 10 percent or more of the capital stock had been convicted of a felony within five years or of a misdemeanor under a Federal law relating to liquor within three years prior to the application (R. 176–182). Petitioner could then have furnished true information and, upon denial of its application, sought judicial review under Section 4 (b) of the order of denial and of the adminis-

trative construction of Section 4 (a) (1) of which it now complains. Petitioner, however, did not do this but falsified its application by failing to reveal its three actual owners, the bootlegging background of two of them, and the conviction of one of those two of a felony under the Prohibition Act (R. 304–306, R. 349–350). On the basis of this application, and without a hearing, the Administrator in July 1936 issued petitioner a wholesaler's basic permit (R. 196–197).

On January 4, 1943, District Supervisor Griffin [2] "having reason to believe" that petitioner had procured its wholesaler's basic permit by fraud, misrepresentation, or concealment of material facts, issued an order to show cause why the wholesaler's permit should not be annulled under the provisions of Section 4 (e) (3) of the Act (R. 165–170). Some time thereafter respondent District Supervisor Rhees, who suceeded Mr. Griffin upon the latter's death, designated a hearing officer (R. 164) and extended hearings were held. At the conclusion of these hearings, the hearing officer found that petitioner had misrepresented to and concealed from the Administrator material facts in obtaining its wholesaler's permit and recommended its annulment (R. 257–302). An order of annulment was entered by District Su-

[2] In the interval between the issuance of petitioner's wholesaler's permit and the institution of the annulment proceedings, the powers vested in the Administrator by the Act had been delegated to, among others, the various District Supervisors of the Alcohol Tax Unit, *supra*, pp. 4–5.

pervisor Rhees on October 11, 1943 (R. 303–306). An application for reconsideration (R. 307–319) was granted and the order sustained after argument before the District Supervisor (R. 320, 322–323).[3] Petitioner thereupon filed with the Deputy Commissioner of Internal Revenue a petition for review (R. 325–337). After considering the administrative record and hearing oral argument by counsel for petitioner, the Deputy Commissioner affirmed the order of annulment (R. 338–339). Petitioner then appealed to the Circuit Court of Appeals for the Second Circuit which rendered a decision affirming the order of annulment (R. 346–350), denied an appication for rehearing (R. 351–352, 357), and entered an order of affirmance (R. 359).

ARGUMENT

I

Petitioner contends that it was deprived of a fair hearing because the District Supervisor, the trier of fact, was "clothed with the functions of instituting annulment proceedings, after forming an opinion that good cause for annulment exists, and of prosecuting annulment cases" (Pet. 13). The lack of substance in this contention is suggested by the absence of any citation of supporting authority despite the union of these functions in a large proportion of the older Federal ad-

[3] Under the statute and regulations, the order of annulment is stayed pending administrative and judicial review.

ministrative agencies. See, for example, Federal Trade Commission Act, 38 Stat. 717, 719, 15 U. S. C. 45b; Clayton Act, 38 Stat. 730, 734, 15 U. S. C. 21; Securities and Exchange Act of 1934, as amended, 48 Stat. 881, 49 Stat. 1375, 1376; 15 U. S. C. 78l (f); National Labor Relations Act, 49 Stat. 449, 453, 29 U. S. C. 160b; Communications Act of 1934, 48 Stat. 1064, 1072, 47 U. S. C. 205; Packers and Stockyards Act, 42 Stat. 159, 166, 7 U. S. C. 211, which was before the Court in *Morgan* v. *United States*, 298 U. S. 468, 304 U. S. 1, referred to by petitioner.

Even if there might be in practice, under certain circumstances, such a close union of these functions as to create as a matter of law or fact a disqualifying bias in the administrative officer or agency, petitioner has not shown the existence of any such bias in the present case. The record shows only that District Supervisor Griffin issued the order to show cause why petitioner's wholesaler's basic permit should not be annulled (R. 165–170) and furnished a bill of particulars (R. 172–174); that Mr. Griffin's successor, District Supervisor Rhees, appointed a hearing officer (R. 164); that both sides were represented by counsel, who introduced oral and documentary testimony and examined and cross-examined witnesses; that the hearing officer made a report to District Supervisor Rhees (R. 257–302), who issued the order of annulment (R. 303–306), which was, on application, reconsidered by the District

Supervisor (R. 308–321) and reviewed for errors by the Deputy Commissioner (R. 338) and by the Circuit Court of Appeals for the Second Circuit (R. 346–359). Other facts material to the issue are not contained in the record[4] because the petitioner did not contend before the District Supervisor (R. 308–319), the Deputy Commissioner (R. 325–336), or the Court of Appeals (R. a–n) that it was deprived of a fair hearing. Section 4 (h) of the Act provides that: "No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do." It is submitted that under these circumstances no question calling for review by this Court is presented by this aspect of the petition for certiorari.

II

Petitioner contends that the Administrator erred in construing Section 4 (a) (1) as only permitting the issuance of "grandfather" basic permits for the same operations as to which basic permits had previously been issued by the Federal Alcohol Control Administration. This question has been considered only by the Circuit Court of

[4] Petitioner erroneously states that the hearing officer and the attorney representing the Government in the administrative hearings were attorneys on the staff of respondent Rhees (Pet. 3). Both of them were on the staff of the general counsel of the Treasury Department and subject neither to the control nor supervision of the District Supervisor.

Appeals for the Second Circuit. It was first urged, upon almost identical facts, in *Thomas J. Molloy & Co.* v. *Berkshire,* 143 F. 2d 218, and was rejected in an opinion which adequately disposes of the question on the merits. It was also urged in an unsuccessful application for a writ of certiorari in that case, 323 U. S. 802. In these circumstances it seems unnecessary to discuss the question of statutory construction further here.

In opposing the application in that case the Government contended, as it does here, that petitioner had no standing to present the question of the construction of Section 4 (a) (1). Petitioner has argued the propriety of the administrative action in this record as though it were appealing from a denial of a permit on the ground that it was legally unfit to hold one, whereas it is, in fact, contesting the annulment of a permit on the ground that it was obtained by illegal means. It is no longer disputed that the permit was obtained without a hearing by misrepresenting facts which both the Administrator of the Act and the petitioner at the time of issuance believed to be material. The only claim of immateriality is that under a different construction of the statute than that adopted by the Administrator and acquiesced in by the petitioner at that time, the petitioner might have obtained the permit as a matter of right.

Petitioner now seeks a review by this Court of a construction of Section 4 (a) which was adhered to by all parties when the permit was issued, although the sole purpose of this proceeding is to determine whether or not petitioner had fraudulently procured the permit within the meaning of Section 4 (e) (3). No legislative history, court decisions or legal materials have been cited by petitioner to suggest that Section 4 (e) (3) means anything other than what it says. The policy embodied in this section of the Act is simply one aspect of the general policy of the Government to require those who seek benefits from it to make honest statements in procuring them. The basic statute embodying this requirement is Section 35 (A) of the Criminal Code, 18 U. S. C. 80, originally passed in 1909 to punish criminally the making of false claims but broadened in 1934 to include the willful making or using of any fraudulent statements in matters over which a federal agency has jurisdiction. In *United States* v. *Gilliland,* 312 U. S. 86, 93, the Court said that this amendment "indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." In carrying out this policy, Congress has frequently resorted to statutory provisions, such as Section 4 (e) (3), which deprive persons of the specific benefits pro-

cured by dishonest statements to particular governmental agencies.[5]

That petitioner has no right to a review of the Administrator's construction of Section 4 (a) in this proceeding is established by *United States* v. *Kapp,* 302 U. S. 214, and *Kay* v. *United States,* 303 U. S. 1. In the former case, the Court held that a defendant charged with conspiring to violate Section 35 (A) of the Criminal Code by making fraudulent representations in order to procure benefit payments under the Agricultural Adjustment Act of 1933 could not question the authority of the Secretary of Agriculture to require the furnishing of the information in question even though the Act which granted it had been declared unconstitutional in *United States* v. *Butler,* 297 U. S. 1. In so holding the Court said (p. 218):

> It is cheating the Government at which the statute aims and Congress was entitled to protect the Government against those who would swindle it regardless of questions of constitutional authority as to the operations that the Government is conducting. Such questions cannot be raised by those who make false claims against the Government.

In the *Kay* case the Court held that the constitutionality of the Home Owners' Loan Act was

[5] Cf. 30 U. S. C. 227, punishing fraud or dishonest conduct in procuring leases on Navy petroleum reserves by depriving persons guilty thereof of the benefits of such leases; 45 U. S. C. 354, punishing the making or aiding in making of fraudulent statements to procure railroad unemployment insurance benefits by depriving persons guilty thereof of such benefits.

immune against attack in a proceeding charging a violation of Section 8 (a) of that Act, 12 U. S. C. sec. 1467 (a), which punishes the making of false representations for the purpose of influencing action on a loan application. In so holding, the Court said (p. 6):

> There is no occasion to consider this broad question as petitioner is not entitled to raise it. When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.

A fortiori, one who misleads an administrative officer of the Government by false statements has no standing to assert that the proceeding in which the statements were made was without statutory sanction.

CONCLUSION

The decision below is correct and no question of statutory construction is presented. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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